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Legal Issues Related to Identity Management and Trust Services

Note by the Secretariat

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I. Introduction

1. At its forty-eighth session, in 2015, the Commission requested the Secretariat to conduct preparatory work on legal aspects of identity management and trust services, including through the organization of colloquia and expert group meetings, for future discussion at the Working Group level following the completion of work on electronic transferable records on the basis of a proposal submitted to the Commission for its consideration (A/CN.9/854).[1]

2. At that session, the Commission also asked the Secretariat to share the result of such preparatory work with Working Group IV, with a view to seeking recommendations on the exact scope, possible methodology and priorities for the consideration of the Commission at its forty-ninth session.[2]

3. At its forty-ninth session, in 2016, the Commission had before it a note by the Secretariat on legal issues related to identity management and trust services (A/CN.9/891) summarizing the discussions during the UNCITRAL Colloquium on Legal Issues Related to Identity Management and Trust Services held in Vienna on 21 and 22 April 2016 and complemented by other material.

4. At that session, the Commission agreed that the topics of identity management and trust services, as well as of cloud computing, should be retained on the work agenda of the Working Group and that it would be premature to prioritize between the two topics. The Commission confirmed its decision that the Working Group could take up work on those topics upon completion of the work on the Model Law on Electronic Transferable Records. In that context, the Secretariat, within its existing resources, and the Working Group were asked to continue to update and conduct preparatory work on the two topics including their feasibility in parallel and in a flexible manner and report back to the Commission so that it could make an informed decision at a future session, including the priority to be given to each topic. [3]

5. At its fifty-fourth session (Vienna, 31 October–4 November 2016), the Working Group held a preliminary exchange of view on its possible future work on legal aspects of identity management and trust services.

6. At that session the Working Group agreed that such future work should be limited to the use of identity management systems for commercial purposes and that it should not take into account the private or public nature of the identity management services provider. The Working Group also agreed that, while work on identity management could be taken up before work on trust services, the identification and definition of terms relevant for identity management and trust services should take place simultaneously given the close relationship between the two. It was further agreed that focus should be placed on multi-party identity systems and on natural and legal persons, without excluding consideration of two-party identity systems and of physical and digital objects when appropriate. In addition, it was agreed that the Working Group should continue its work by further clarifying the goals of the project, specifying its scope, identifying applicable general principles and drafting necessary definitions (A/CN.9/897, paras. 118–120 and 122).

7. At its fifty-fifth session (New York, 24–28 April 2017), the Working Group discussed various aspects of its possible future work on legal aspects of identity management and trust services. In particular, at that session the Working Group discussed the objectives of the project, the general principles inspiring the project and the possible subjects to be addressed by future work.

8. At its fiftieth session, in 2017, after discussion the Commission reaffirmed the mandate given to the Working Group at its forty-ninth session, in 2016

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 354–355 and 358.

[2] Ibid, para. 358.

[3] Ibid, *Seventy-first Session, Supplement No. 17* (A/71/17), para. 229.

(see para. 4 above). It agreed to revisit that mandate at its fifty-first session, in particular if the need arose to prioritize between the topics or to give a more specific mandate to the Working Group as regards its work in the area of identity management and trust services. The Secretariat was requested to consider convening expert group meetings as it deemed necessary to expedite the work in both areas and ensure the productive use of conference resources by the Working Group. States and international organizations were invited to share with the Working Group and the Secretariat their expertise in the areas of work assigned to the Working Group.

9. The Secretariat convened an expert group meeting on legal aspects of identity management and trust services in Vienna on 23 and 24 November 2017. This note, based on comments made on that occasion as well as other relevant material, is submitted to the Working Group to facilitate further discussion on the scope and goals of possible future work in that field.

II. Relevant Issues for Future Work on Legal Aspects of Identity Management and Trust Services

10. The fundamental importance of identity management ("IdM") and trust services for all types of electronic transaction has been repeatedly noted. In particular, the desirability of preparing adequate legal tools to facilitate mutual legal recognition and, more generally, clarify the legal status of IdM and trust services has been suggested. Hence, support has been expressed for conducting work in support of establishing an enabling environment for IdM and trust services.

11. The emergence of different approaches, reflected in national and regional legislation, has also been noted. Taking into account existing legislation, it has been suggested that guidance should be given to prevent fragmentation that could hinder cross-border transactions. In that respect, the interrelation between mutual legal recognition and technical interoperability has been stressed.

12. However, the view has also been expressed that any project in the field should have a clearly recognizable impact on legal issues. In that respect, it was indicated that the overarching goal should be to identify legal obstacles to the use of IdM and trust services and prepare tools to overcome them.

13. With respect to work on IdM, two possible approaches have been identified. The first approach suggests that guidance should be given on fundamental issues related to the legal effects of IdM, including, but not limited to, cross-border ones (A/CN.9/902, para. 34). The second approach recommends focusing on cross-border issues, in the context of a commonly-understood framework of reference (A/CN.9/902, para. 32).

14. The two approaches share common elements, including applicable general principles. Those general principles have been identified as: technological neutrality, including with respect to economic and system models; functional equivalence, to the extent applicable; non-discrimination against the use of electronic means; and party autonomy (A/CN.9/902, paras. 52, 54 and 63).

15. Moreover, both approaches focus on addressing matters specific to IdM and trust services. Other laws, e.g. laws generally applicable to commercial transactions or to electronic transactions, would not be affected. Moreover, parties to a commercial transaction may decide to agree on specific IdM rules. Those contractual rules may be particularly relevant in the context of federated IdM systems. Both approaches aim at supporting enforceability of contractual rules.

16. With respect to the first approach, suggesting that guidance should be given on fundamental issues related to the legal effects of IdM, several possibly relevant topics have been identified. Those topics include: legal recognition, mutual recognition, attribution of identity information, attribution of actions, liability and risk allocation, and transparency. Those topics may be relevant also for a discussion of legal issues

related to trust services. The Working Group may wish to recall its preliminary discussion of those topics (A/CN.9/902, paras. 66–85).

17. Should that approach be followed, it was suggested that work could commence by identifying cases where IdM was used. In that respect, it should be noted that identification may be required for different purposes. Reference is often made to regulatory compliance. One example of such requirement is the application of "Know Your Customer" (KYC) rules in the finance, telecom and other business sectors. Another example may be found in the field of electronic procurement, where the correct identification of potential vendors is necessary, for instance, to prevent fraud and collusion and to enforce debarment.

18. Moreover, identification may be required for the validity of a commercial document. For instance, the law applicable to a bill of lading may require the identification of certain parties (see e.g. art. 15 of the Hamburg Rules[4] and art. 36 of the Rotterdam Rules[5]).

19. Lastly, parties to a transaction may have an interest in identifying each other online accurately and may agree on the use of certain procedures and methods to achieve that goal. The source of that duty to identify is therefore contractual.

20. Another potentially relevant issue under this approach is the desirability and feasibility of formulating a functional equivalence rule for the notion of "identification" on the basis of paper-based documents or similar credentials.

21. The second approach envisages facilitating a common understanding on how existing IdM systems, including their legal framework, may interact. Under that approach, existing identification schemes would not be affected; however, a tool would be created to achieve mutual legal recognition among those schemes.

22. Discussions on that second approach highlighted how a model based on a centrally-managed licensing system may pose challenges at the global level. In particular, governance of that licensing system could be complex and costly. Moreover, a centrally-managed system may not be reacting to developments as quickly as technological evolution may require, thus possibly hindering innovation. Hence, it was suggested that alternative solutions should be explored.

23. One suggestion made reference to the possibility of mapping IdM systems according to a common template. Referring to generic description of levels of assurance could ensure that exercise would be outcome-based, which, in turn, would preserve the application of the principle of technological neutrality. Guidance could be provided also on the mapping exercise, which could be carried out by any concerned party, including private and commercial entities.

24. Elements possibly relevant for the mapping exercise may be identified in the Commission Implementing Regulation (EU) 2015/1502, operating in the framework of the eIDAS Regulation.[6] Those elements are: enrolment, electronic identification means management, authentication, and management and organization. Each element includes several sub-elements.

25. The legal effects of the mapping exercise would be defined by the scheme in which the IdM tool is supposed to operate. In that respect, the Working Group may wish to consider the desirability and feasibility of possible discussions on definitions of levels of assurance and legal consequences thereof. Similarly, the Working Group may wish to consider if, and to what extent, guidance could be provided on specifications and procedures to be followed in the mapping exercise.

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[4] United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3.

[5] General Assembly resolution 63/122, annex.

[6] Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

26. A practical example may illustrate how the mapping exercise might work. As noted above, KYC requirements are common in various business sectors. Those requirements may not be satisfied by using identity credentials issued in a different jurisdiction without a formal mechanism for mutual recognition of IdM schemes. In the absence of such mechanism, the foreign credentials could be mapped against generic descriptions of levels of assurance. It would thus be possible to verify whether the suggested foreign identity credentials could satisfy the requirements for the level of assurance needed for KYC purposes.

27. The level of assurance for enrolment where KYC requirements are applied may be higher than the level of assurance required for carrying out remote banking transactions, and significantly higher than those required for accessing a mobile telephone. Under the suggested approach, different foreign credentials could be used in a flexible manner to satisfy the various identification needs.

28. Certain issues may be relevant in defining the scope of possible future work of the Working Group regardless of the recommended approach. One such issue is whether the scope of work should be limited to commercial transactions, or extend to transactions with other entities, to the extent that those are relevant for business (e.g., identification in the context of paperless trade facilitation), or cover all forms of identification regardless of the nature of the transaction.

29. In that respect, it may be useful to take into consideration the distinction between primary determination of identity (also called foundational identity) and secondary determination of identity (also called transactional or functional identity). The primary determination of identity may raise complex issues of status attribution. However, commercial transactions may rely, in full or in part, on a secondary determination of identity. The actual legal consequences of identity verification would be determined by factual and other relevant circumstances of the specific transaction.

30. With regard to possible future work on legal issues relating to trust services, support was expressed for closely coordinating that work with work on IdM. The suggestion was also made that such work should consider an open-ended list of trust services based on a common definition of "trust service".

31. The Working Group may recall the Commission's request to the Working Group to continue updating and conducting preparatory work on legal aspects of IdM and trust services, including with respect to feasibility, and to report back to the Commission to enable it to make an informed decision at its next session (see paras. 4 and 8 above).

32. In light of that request, the Working Group may wish to formulate a recommendation to the Commission on future work in the field of IdM and trust services. That recommendation might indicate the details of the work to be undertaken, the form it might take and how it might best be progressed, including the possibility of adopting a flexible approach to working methods. In formulating that recommendation, the Working Group may wish to take into account:

(a) The potential legal effect of such work on removing obstacles to the broader use of IdM and trust services and preventing the creation of new obstacles;

(b) Types of electronic transactions to be covered, in particular involvement of non-commercial entities;

(c) Possible legal treatment of legal recognition, attribution of identity information, attribution of actions, liability and risk allocation, and transparency in the context of IdM and trust services; and

(d) Cross-border aspects, namely mutual recognition and elements relevant for a mapping exercise such as enrolment, electronic identification means management, authentication, and management and organization.

33. Additional considerations on legal aspects of IdM and trust services may be found in documents A/CN.9/WG.IV/WP.141, A/CN.9/WG.IV/WP.144, A/CN.9/WG.IV/WP.145 and A/CN.9/WG.IV/WP.146 as well as in documents A/CN.9/891 and A/CN.9/902.